Supreme Court, U.S.
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96 806 NOV 19 1996

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RAAD QASGUARGIS, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner is a lawful permanent resident of the United States.. The court of appeals, pursuant to Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), held that the final order of deportation against petitioner is not subject to judicial review by any court, and thus dismissed petitioner's appeal of that order for lack of jurisdiction. The questions presented are:

1. Whether the deportation of a lawful permanent resident alien without the possibility of judicial review of the alien's deportation order constitutes a deprivation of liberty without due process in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. Whether it is a violation of the separation of powers doctrine of Article III, § 1 of the United States Constitution for Congress to grant the Attorney General the complete authority to issue, prosecute, adjudicate and execute final orders of deportation without the possibility of independent judicial review by an Article III court?

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PETITION FOR A WRIT OF CERTIORARI

Raad Qasguargis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-4a) is reported at 91 F.3d 788. The decision of the Board of Immigration Appeals (App., *infra*, 6a-7a) is unreported. The decision of the immigration judge (App., *infra*, 8a-12a), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1996, and a timely petition for rehearing, with suggestion of rehearing *en banc*, was denied by the court of appeals on August 21, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1276-77 (1996), codified at 8 U.S.C. § 1105a(a)(10), provides as follows:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. Article III of the United States Constitution, U.S. CONST. ART. III, is reproduced in its entirety at App., *infra*, 13a-14a.

STATEMENT

1. Petitioner Raad Qasguargis is a native of Iraq who entered the United States as a lawful permanent resident on February 17, 1966, at the age of 10. On June 23, 1993, the INS issued an order to show cause charging petitioner with deportability, based upon his conviction 12 years earlier for

attempted carrying of a concealed weapon, and his conviction 6 years earlier for delivery of less than 50 grams of cocaine. At the hearing before the Immigration Judge, petitioner conceded deportability, but sought relief from deportation under Section 212(c) of the Act, 8 U.S.C. § 1182(c), based upon evidence of his rehabilitation, remorse and extensive family ties in the United States, including his parents, three sisters and one brother. On January 20, 1995, the Immigration Judge ruled that petitioner's § 212(c) application could not be considered because of petitioner's 1981 firearms conviction. Although the Judge recognized "that an attempted firearms violation cannot support a charge of deportability," the judge noted that "the recently-enacted Immigration and Nationality Technical Correction Act of 1994 states otherwise." The Immigration Judge thus found petitioner "statutorily ineligible for section 212(c) relief from deportation" and "pretermitted" his application for relief. App., *infra*, 11a. Petitioner was ordered deported to Iraq.

2. Petitioner appealed to the Board of Immigration Appeals (BIA), arguing that application of the 1994 Immigration and Nationality Technical Correction Act, Pub. L. No, 103-416, 108 Stat. 4311 (1994) to his 1981 firearms conviction constituted an impermissible retroactive application of the statute in violation of this Court's holding in *Landgraf* v. *U.S.I. Film Products*, 114 S. Ct. 1483 (1994). On April 9, 1996, the BIA dismissed petitioner's appeal, holding that retroactive application of the 1994 Act to petitioner's 1981 conviction was proper under *Landgraf*. App., *infra*, 7a.

3. On April 24, 1996 the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Section 440(a) of the AEDPA provides that "[a]ny final order of deportation against an alien who is deportable by reason of having committed" one of a number of specific offenses, "shall

not be subject to review by any court." Two weeks after the AEDPA was signed into law, petitioner filed a timely appeal with the Sixth Circuit, challenging the BIA's denial of § 212(c) relief and its retroactive application of the 1994 Technical Corrections Act. The INS moved to dismiss petitioner's appeal pursuant to § 440(a) of the AEDPA on the grounds that the statute immunized the final order of deportation against petitioner from any form of judicial review. Petitioner opposed the motion, arguing, *inter alia*, that "[t]he Due Process Clause of the Fifth Amendment prevents Congress from shutting off judicial review in deportation proceedings and grants to resident aliens a substantive right to seek review in an Article III court of a final order of deportation." Pet. C.A. Br. at 5 (citations omitted). Petitioner also argued that "immunizing final orders of deportation from all forms of judicial review violates the separation of powers restriction of Article III." *Ibid.* (citation omitted).

INS, in defending the constitutionality of § 440(a), argued that "deportable aliens have no substantive right to judicial review under the Constitution," and that "whatever due process considerations govern the removal of aliens are satisfied by notice of the charges against an alien and an opportunity to answer those charges in an administrative setting." INS C.A. Reply Br. at 3. INS also argued that petitioner's Article III challenge to § 440(a) "must fail in the face of Congress' plenary power over immigration matters and its power to remove jurisdiction from article III courts." *Id.* at 4.

The court of appeals, in a brief order, dismissed petitioner's appeal pursuant to § 440(a) without addressing his claim that the final order of deportation against him was unlawful. App., *infra*, 1a-4a. The court of appeals implicitly rejected petitioner's challenge to the constitutionality of § 440(a) under the Due Process Clause and Article III.

REASONS FOR GRANTING THE PETITION

This case presents for review the important and unanswered question of whether lawful permanent residents can constitutionally be deported from the United States without the possibility of independent judicial review. Section 440(a) of the AEDPA, for the first time in U.S. history, has broadly divested the federal courts of their power to review final orders of deportation against literally thousands of aliens. Section 440(a) thus squarely raises for the first time the difficult question of whether deporting lawful permanent residents without independent judicial scrutiny violates the Due Process Clause of the Fifth Amendment and/or the separation of powers doctrine of Article III, § 1. As the INS itself conceded in the court of appeals, the issues raised by this case are both "novel and of substantial public importance." INS C.A. Motion For Publication, at 1. Accord *Zavala-Zaragoza* v. *INS*, 92 F.3d 1195 (9th Cir. 1996) (Table) (noting that § 440(a) "presents difficult, even arcane, issues regarding retroactivity and constitutionality").

For many decades, courts and commentators alike have recognized the uncertainty over Congress' constitutional ability to preclude all judicial review of executive action, particularly where core constitutional liberty interests are at stake. As a direct byproduct of this uncertainty, in the short time since § 440(a) was signed into law, the federal courts have divided over the constitutional limits on Congress' power to preclude judicial review in deportation cases. Some courts, including the Ninth Circuit, have held that § 440(a) categorically precludes judicial review of deportation orders notwithstanding the Due Process Clause and Article III of the Constitution. See *Duldulao* v. *INS*, 90 F.3d 396 (9th Cir. 1996). Other courts, such as the Third Circuit, have recognized that Congress cannot preclude all judicial review of deportation orders, and that such review is constitutionally guaranteed where "constitutional rights applicable to aliens may be at stake." *Salazar-Haro* v.

INS, 95 F.3d 309, 311 (1996). Other courts have adopted yet a different approach, holding that judicial review is constitutionally mandated where "deportation would result in a fundamental miscarriage of justice." *Mbiya* v. *INS*, 930 F. Supp. 609, 612 (N.D. Ga. 1996); *Powell* v. *Jenifert*, 937 F. Supp. 1245 (E.D. Mich. 1996).

In short, federal decisions applying § 440(a) themselves reflect the long-standing confusion over whether, or to what extent, Congress constitutionally can preclude judicial review of final orders of deportation, particularly in those cases, such as this, involving lawful permanent residents. This case provides an ideal opportunity for the Court to resolve that question once and for all.

During the past seven months, Congress has enacted numerous statutory provisions that preclude judicial review over a wide variety of deportation decisions by the Attorney General. This, in turn, has led to an explosion of litigation in the federal courts over the constitutionality of such "door closing" statutes—litigation that will continue until the fundamental constitutional questions raised here are resolved by this Court.

The need for Supreme Court review in this case also is especially compelling because until this Court decides whether Congress constitutionally can preclude judicial review of final orders of deportation, permanent residents such as petitioner will continue to be deported without judicial review and without any independent guarantee that their deportations are lawful. Indeed, if the Sixth Circuit is wrong that § 440(a) constitutionally deprives the federal courts of appeals of jurisdiction to review final orders of deportation, and it is subsequently determined that § 440(a) violate the Due Process Clause and/or Article III, it will be of little consolation to petitioner after he is exiled to Iraq. Simply put, the need for Supreme Court review is both immediate and compelling.

I. THE COURT OF APPEALS' APPLICATION OF § 440(a) CONFLICTS WITH THIS COURT'S DUE PROCESS AND ARTICLE III DECISIONS.

By holding that § 440(a) completely deprived it of jurisdiction to review the lawfulness of the final order of deportation against petitioner, thus leaving petitioner with no avenue in which to challenge that order, the decision below irreconcilably conflicts with this Court's long-standing interpretations of the Due Process Clause of the Fifth Amendment and the separation of powers doctrine of Article III, § 1 of the Constitution.

A. Section 440(a) Violates the Due Process Clause.

In *Landon* v. *Plasencia*, 459 U.S. 21, 32-33 (1982), this Court held that "a continuously present resident alien * * * threatened with deportation * * * has a right to due process in such a situation." *Plasencia* also confirmed that the due process framework articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), applies to resident aliens:

> "[T]he courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional safeguards, and the interest of the government in using the current procedures rather than additional or different procedures."

459 U.S. at 34, quoting *Mathews*, 424 U.S. at 334-335. *Plasencia* also reiterated the Court's long-standing recognition that a lawful resident alien's interest in avoiding deportation "is, without question, a weighty one. She stands to lose the right 'to stay and live and work in this land of freedom. * * * Further, she may lose the right to rejoin her immediate family, a right to ranks high among the interests of the individual."

Plasencia, 459 U.S. at 34, quoting *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945).[1]

Since *Plasencia*, the Court carefully has protected the ability of aliens to seek judicial review. For instance, in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991), the Court refused to construe the INA in a way that would "be tantamount to a complete denial of judicial review for most undocumented aliens," and "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." The Court also since has observed that judicial review may well be constitutionally-guaranteed where liberty interests are at stake. See *Superintendent* v. *Hill*, 472 U.S. 445, 449 (1985) (noting that the Court's modern due process decisions "suggest that due process might require some form of judicial review of administrative decisions that threaten constitutionally protected liberty or property interests"); *BMW of North America, Inc.* v. *Gore*, 116 S. Ct. 1589, 1685 (1996) (Breyer, J., concurring) (noting due process concern of guarding against arbitrary deprivations of life, liberty or property, and that "[t]his constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion").[2]

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[1] The interests of long-standing permanent resident aliens like respondent are even more compelling than those of the returning alien in *Plasencia*, since applicants for § 212(c) relief are not only lawful permanent residents, but have been lawfully and continuously present in the United States for seven years or longer. See *Mathews* v. *Diaz*, 426 U.S. 67 (1976).

[2] See also *Crowell* v. *Benson*, 285 U.S. 22, 61 (1932) ("when fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action'"); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("[t]he supremacy of law demands that there shall be opportunity

Applying the due process test articulated in *Mathews* and *Plasencia*, and particularly given the magnitude of the liberty interests at stake for lawful permanent residents who face permanent separation from their families, it is readily apparent that judicial review of final orders of deportation is guaranteed by the Due Process Clause. *First*, as to the "interest at stake for the individual," (*Plasencia*, 459 U.S. at 34), this Court repeatedly has acknowledged the constitutionally-protected liberty interests that are threatened by deportation. See, *e.g.*, *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (noting that to deport an alien "obviously deprives him of liberty" and "may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law"); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950) (deportation involves "issues basic to human liberty and happiness"); *Bridges*, 326 U.S. at 154 ("Here the liberty of an individual is at stake. * * * Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness"); *Yamataya* v. *Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 101 (1903). See also S. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1209 (1989) ("Our legal system can tolerate occasional unfairness when the stakes are trivial, but claims that affect truly significant interests demand

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to have some court decide whether an erroneous rule of law was applied"); R. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 372 (1993) ("[t]he weightier the affected individual interest, the greater the likelihood that due process will mandate judicial review and individually effective remediation"). *Cf. Chicago, Milwaukee, and St. Paul Rwy.* v. *Minnesota*, 134 U.S. 418, 458 (1890) (holding that due process is violated where person is deprived of property "in the absence of an investigation by judicial machinery").

a more meticulous brand of justice"). Indeed, the basic liberty interests implicated by deportation "demonstrates the importance of independent judicial review in an area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death." *Rodriguez-Roman* v. *INS*, 98 F.3d 416, 1996 WL 577820, at *14 (9th Cir. 1996) (Kozinski, J., concurring).

Second, the "risk of an erroneous deprivation" (*Plasencia*, 459 U.S. at 34) in deportation cases without judicial review is impermissibly great. See *Reyes-Hernandez* v. *INS*, 89 F.3d 490, 492 (7th Cir. 1996) (Posner, C.J.) (noting that the Seventh Circuit "has on a nontrivial number of occasions vacated the Board's denial of section 212(c) relief"); *Salameda* v. *INS*, 70 F.3d 447, 449 (7th Cir. 1995) (Posner, C.J.) ("opinions rendered by * * * the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality"); P. Schuck, *Continuity and Change: Patterns of Immigration Litigation in the Courts: 1979-1990*, 45 STAN. L. REV. 159, 167 (1992) (noting that aliens prevailed in approximately 28% of cases seeking judicial review of final orders of deportation or exclusion); M. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861 (1994); Legomsky, 73 MINN. L. REV. at 1210 ("federal judges generally have broader legal experience and a broader knowledge of fundamental legal doctrine than do immigration judges"). As Judge Kozinski recently cautioned, "agencies are run by people and people make mistakes. Review by a tribunal outside the agency helps correct these rare but tragic errors. In the case of [aliens facing deportation], this may mean the difference between life and death; the effort is surely worth the candle." *Rodriguez-Roman* v. *INS*, 98 F.3d 416, 1996 WL 577820, at *15 (concurring opinion).

Finally, whatever the government's interest in the "expeditious" deportation of lawful permanent residents may be, that

interest can legitimately extend only to deporting those aliens who properly are subject to deportation, and whose deportations comport with the laws and Constitution of the United States. The government cannot plausibly assert a legitimate interest in deporting resident aliens who qualify for statutory relief from deportation, and who arbitrarily have been denied such relief. See *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023, 1040 (5th Cir. 1982) ("[a]lthough the government does have an interest in acting with dispatch, it is also in the government's interest to make informed determinations"); *Probert* v. *INS*, 750 F. Supp. 252 (E.D. Mich. 1990), *aff'd*, 954 F.2d 1253 (6th Cir. 1992) ("Congress has broad authority in protecting Americans against illegal drug transactions. But in doing so, it must legislate within the protections of the Fifth Amendment"). While it may be that deportations might be delayed in order to assure that they are carried out lawfully, such "considerations are weak arguments for eliminating judicial review." Legomsky, 73 MINN. L. REV. at 1211.

In sum, the due process principles of *Plasencia* and *Mathews* v. *Eldridge* makes clear that § 440(a), by barring judicial review of final orders of deportation, violates the Due Process Clause, and that it cannot constitutionally be applied to this case.[3]

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[3] In *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952), thirty years before *Plasencia* was decided, the Court noted in *dictum* that "[n]o judicial review is guaranteed by the Constitution." (Citing *Turner* v. *Williams*, 194 U.S. 279, 290-91 (1904); *Zakonaite* v. *Wolf*, 226 U.S. 272, 275 (1912); *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913); *Mahler* v. *Eby*, 264 U.S. 32, 44 (1924)). None of the cases cited by the Court, however, involved a denial of judicial review or indicated that judicial review could constitutionally be denied. In fact, each of these cases emphasized the availability of judicial review. For instance, in *Mahler* v. *Eby*, 264 U.S. at 46, the Court endorsed the availability of "habeas corpus proceedings to test the legality of confinement under the decision of an administrative tribunal like the

B. Section 440(a) Also Violates the Separation of Powers Doctrine of Article III, § 1.

Above and beyond the guarantees of the Due Process Clause, Congress' attempt to preclude the Article III courts from exercising their traditional powers of judicial review over final orders of deportation violates the separation of powers principles of Article III, § 1 of the Constitution. As this Court explained in *Plaut* v. *Spendthrift Farm*, 115 S. Ct. 1447, 1463 (1995), the systemic protections of Article III are not a function of individual rights, but are meant to preserve the structural integrity of our tripartite form of government:

> the doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

Secretary of Labor in deportation cases." And in *Turner* v. *Williams*, 194 U.S. at 295, Justice Brewer, in a concurring opinion, wrote that "the courts may and must, when properly called upon by petition in habeas corpus examine and determine the right of any individual retrained of his personal liberty to be discharged from such restraint. I do not believe it within the power of Congress to give to ministerial officers final adjudication of the right to liberty, or to oust the courts from the duty of inquiry respecting both law and facts." Moreover, *Carlson* did not involve judicial review of a deportation order, but instead dealt with discretionary bail determinations. And the Court ultimately recognized that the executive's "power to expel aliens * * * is, of course, subject to judicial intervention under the 'paramount law of the constitution.'" 342 U.S. at 533.

Accord *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851 (1986) ("Article III, § 1, serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government' . . . and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government'") (quoting *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985).[4]

In *Schor*, the Court articulated the framework for defining the separation of powers component of Article III, § 1:

> in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused regard the extent to which the "essential attributes of

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[4] See also R. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 943 (1988) ("[I]n contrast to the due process clause, article III has an explicit and important separation of powers dimension. A pure due process calculus might undervalue the constitutional interest in maintaining a judicial check against arbitrariness, self-aggrandizement, or politically motivated infidelity to the requirements of law"); D. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L. J. 291, 302 (1990) ("Article III protects the rights of litigants precisely *through* its creation of judicial independence, just as more generally a system of separated powers is thought to promote individual liberty") (emphasis in original); A. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 451 n.43 (1989) (agency adjudications "must generally be reviewable by Article III tribunals to guarantee conformity with federal law, as expounded by the Article III judiciary"); G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 768 (1986).

> judicial power" are reserved to Article III courts, and conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove the Congress to depart from the requirements of Article III.

Id. at 851 (citing *Thomas*, 473 U.S. at 589-93; *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84-86 (1982)). In this case, each of the *Schor* factors decidedly confirms that § 440(a) violates Article III.

First, the "essential attributes of judicial power" would not be reserved to an Article III court under § 440(a). For more than 100 years, the federal courts have, without interruption, exercised their powers of judicial review over final orders of deportation, including denials of discretionary relief. See *Foti* v. *INS*, 375 U.S. 217 (1963).[5] Section 440(a) would take that power away from the Article III courts for the first time.

Second, under § 440(a), the powers of appellate review traditionally exercised by federal courts would be vested exclusively in the BIA, a body wholly subject to the control of the Attorney General, the very official whose mission it is to issue and execute final orders of deportation. The BIA's members are civil servants subject to removal by the Attorney General. See 8 C.F.R. § 3.1(a)(1). The BIA only exercises such discretion and authority as is conferred to it by the Attorney General. Its decisions may be (and often are)

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[5] See also, *e.g.*, *Brownell* v. *Rubinstein*, 346 U.S. 929 (1954); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Chin Yow* v. *United States*, 208 U.S. 8 (1908); *Yamataya* v. *Fisher (The Japanese Immigrant Case)*, 189 U.S. 86 (1903); *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892); *United States* v. *Jung Ah Lung*, 124 U.S. 621 (1888).

modified or overruled by the Attorney General. See 8 C.F.R. 3.1(g). See also *INS* v. *Doherty*, 502 U.S. 314, 319 (1992) (Attorney General reversing BIA decision); *Matter of Soriano*, Interim Decision 3289 (1996); *Matter of Hernandez-Casillas*, Interim Decision 3147 (BIA 1990; A.G. 1991), *aff'd*, 983 F.2d 231 (5th Cir. 1993) (same); *Matter of Toboso-Alfonso*, Interim Decision 3222 (BIA 1994) (same).[6]

Third, as explained *supra* at 9-10, the "origin and importance of the rights to be adjudicated" unequivocally favor independent judicial review by an Article III court, both because of the constitutional magnitude of those rights and because of the devastating and long-lasting consequences of deportation to aliens and their families.

Finally, as to the government's interest in "depart[ing] from" Article III (*Schor*, 478 U.S. at 851), while it may be more "convenient" and "efficient" to allow the INS to deport aliens without the "interference" of judicial review, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. * * * There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President." *INS* v. *Chadha*, 462 U.S. 919, 994, 959 (1983).

In the court of appeals below, the government argued that § 440(a) does not violate Article III given Congress' "plenary power over immigration matters" and its power to control the

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[6] If held constitutional, § 440(a) would give rise to a most unfortunate (and unfair) anomaly: aliens affected by § 440(a) would have no right to seek review of BIA decisions, but the INS could unilaterally seek to have adverse decisions by the BIA overruled by the Attorney General.

jurisdiction of the federal courts. Yet, the notion that Congress' plenary power over immigration somehow immunizes the immigration laws from separation of powers scrutiny was laid to rest in *Chadha*, 462 U.S. at 940-41: "The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." See also S. Legomsky, *Immigration Law And The Principle Of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 302.

The Constitution divides the powers of government into three separate branches to guard against any branch exercising unfettered authority in violation of the law:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Chadha, 462 U.S. at 919. *Chadha* recognized the political pressure on the executive branch to exceed its delegated authority over immigration at the expense of aliens who lack any discernible voice in our Government.

While Article III permits the creation and use of non-Article III tribunals, this Court has recognized since at least *Crowell* v. *Benson*, 285 U.S. 22 (1932), that the decisions of such administrative courts must be subject to judicial review. "Even if a case is tried in the first instance in a non-article III tribunal, a separation-of-powers interest remains in ensuring appellate review by an article III court. Appellate review

affords an opportunity to correct legal errors, including those that may have resulted from the kind of political influence on judicial decisionmaking that article III was intended to prevent." Fallon, 101 HARV. L. REV. at 939. Accord *Rodriguez-Roman* v. *INS*, 98 F.3d 416, 1996 WL 577820, at *14 (Kozinski, J., concurring).

If Article III is to mean anything at all, it is that the executive branch may not serve as prosecutor, judge and executioner, nor act as the legal arbiter of its own conduct:

> The argument for unreviewability in such an instance runs up against a mainstay of our system of government. Madison spoke precisely to the point in The Federalist No. 10: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time."

Gutierrez de Martinez v. *Lamagno*, 115 S. Ct. 2227, 2233 (1995) (quoting *The Federalist No. 10*, p. 79 (C. Rossiter ed. 1961) (J. Madison)). See also *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process * * * leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust") (quoting *United States* v. *Nourse*, 34 U.S. (9 Pet.) 28, 29 (1835)).

"To be sure, it is normally up to the courts to decide whether an agency has complied with its statutory mandate." *Chadha*, 462 U.S. at 919 n.22. Indeed, "[t]he underlying

conception [of Article III] is that wielders of governmental power must be subject to the limits of law, and that the applicable limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary." Fallon, 101 HARV. L. REV. at 938, citing *The Federalist No. 78* (A. Hamilton). Section 440(a) would destroy this constitutional balance, and thus clearly violates the separation of powers restrictions of Article III, § 1 as interpreted by the Court.

II. THE QUESTIONS PRESENTED ARE OF GREAT LEGAL AND PRACTICAL IMPORTANCE

In *Felker* v. *Turpin*, 116 S. Ct. 2333 (1996), this Court granted certiorari and ordered expedited briefing to resolve the important question of the constitutionality of the habeas corpus limitations contained in the AEDPA—an issue that no circuit had yet addressed. The need for immediate review of the fundamental issues presented here, however, is at least as compelling as was the case in *Felker* since Congress, during the past seven months alone, has enacted numerous statutory provisions that have eliminated judicial review over a wide variety of deportation decisions, including virtually all discretionary decisions by the Attorney General under the INA.

In addition to the limitations on judicial review contained in the AEDPA, Congress recently enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996), which was signed into law by the President on September 30, 1996. In IIRIRA, Congress added at least six new statutory provisions that limit judicial review of deportation orders. For instance, § 306(a) of IIRIRA broadly precludes judicial review over virtually all discretionary decisions by the Attorney General under the INA, including decisions regarding waivers of deportability and suspension of deportation:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review (i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a).[7]

In short, Congress recently has eliminated judicial review over a wide variety of discretionary determinations by the Attorney General, and over the vast majority of final orders of deportation entered against aliens convicted of virtually any criminal offense. For this reason, it is a certainty that the question of whether Congress constitutionally can preclude judicial review of deportation orders will recur in thousands of pending and future deportation cases which the federal courts will be asked to review, and that the present explosion of judicial review litigation in immigration cases will not abate.

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[7] Other provisions in IIRIRA that eliminate judicial review include § 303(e) (bond or parole determinations by the Attorney General "shall not be subject to review"); § 304(a) (providing that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure"); § 306(a)(2) ("[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i)"); § 306(e) (limiting judicial review of orders entered under § 235(b)(1) of the Act concerning aliens arriving in the United States who have not been admitted or paroled); § 349 ("No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver" under § 212(i) of the INA).

The immediacy and practical importance of the questions presented to aliens like petitioner who are threatened with imminent deportation also cannot be overstated. Until this Court determines whether Congress constitutionally can preclude judicial review in deportation cases such as this, hundreds, if not thousands, of lawful permanent residents like petitioner will be deported by the INS, and will have their extensive family and economic ties to this country destroyed without the slightest assurance by an independent arbiter that those deportations have been carried out lawfully. And if the court of appeals was wrong to dismiss petitioner's appeal for lack of jurisdiction, and this Court someday holds that such elimination of judicial review is indeed unconstitutional, it will be of little solace to aliens whose deportations already were executed without judicial review. As this Court emphasized in *Stone v. INS*, 115 S. Ct. 1537, 1546 (1995), "the consequences of deportation are so final, unlike orders in some other administrative contexts." This is no doubt true for petitioner, who faces imminent separation from his family and deportation to Iraq—a country he has not known since he was 10 years old.

For all of these reasons, this Court should grant review to clarify whether the federal courts have jurisdiction to review final orders of deportation involving the many thousands of aliens covered by § 440(a). As Justice Scalia has noted, there is "[n]othing more wasteful than litigation about where to litigate." *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (dissenting opinion). Given the volume of final deportation orders issued each year, determining the constitutional limit on Congress' ability to restrict judicial review of such orders will eliminate this constant and needless satellite litigation over these persistent but important jurisdictional and constitutional issues.

III. FEDERAL DECISIONS APPLYING § 440(A) REFLECT THE ONGOING CONFUSION OVER WHETHER CONGRESS CONSTITUTIONALLY CAN PRECLUDE JUDICIAL REVIEW OF FINAL ORDERS OF DEPORTATION.

"The extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law." *Superintendent* v. *Hill*, 472 U.S. 445, 450 (1985). Presently, this Court's decisions do not provide a definitive answer to this question, and the federal courts have been unable to reach a consensus on their own. As noted by Professor Fallon, "[t]he Supreme Court has failed to speak unequivocally about questions of entitlement to judicial review." 93 COLUM. L. REV. at 333. Accord, *e.g.*, 5 K. Davis, ADMINISTRATIVE LAW TREATISE § 28:3, at 264 (2d ed. 1984) ("[w]hether a statute that bars judicial review of a substantial constitutional issue would be constitutional has no clear answer in present law. * * * [t]he lower courts have reacted variously to the question"); G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell To Schor*, 35 BUFF. L. REV. 765, 869 (1986). Indeed, for more than 40 years since Professor Hart noted the uncertainty of whether Congress could constitutionally preclude judicial review of deportation decisions in *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387-95 (1953), courts and commentators alike have acknowledged the "confusion" and "disarray" that exists as to the constitutional necessity of judicial review over action by the executive branch[8]—an issue that involves "pro-

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[8] Fallon, 93 COLUM. L. REV. at 309. See also D. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 299, 304 (1990) (arguing that Article III and the Due Process Clause have independent significance as guarantors of judicial review, and noting that the current debate "leaves open large questions about the necessity and scope of judicial review"); A. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 451 (1989) (noting this uncertainty even though "[t]he Supreme Court has grappled with this question on no fewer than four occasions in the 1980s"); P. Bator, *The*

found and long-debated questions about the power of Congress, consistent with Article III, to preclude all judicial review of executive agency action." *Marozsan* v. *United States*, 852 F.2d 1469, 1479 (7th Cir. 1988) (en banc).

Recent attempts by the federal courts to apply § 440(a) of the AEDPA reflect the ongoing confusion over the extent to which Congress constitutionally can preclude judicial review of such orders. Indeed, the courts have openly recognized that § 440(a) "is replete with novel jurisdictional and legal questions." *Powell* v. *Jenifert*, 937 F. Supp. 1245, 1246 (E.D. Mich. 1996). In any event, as demonstrated below, the federal courts have been unable to reach any consensus on this important and unanswered question, and there is no reason at all to believe that such a consensus will be reached in the absence of Supreme Court review.

For instance, in *Duldulao* v. *INS*, 90 F.3d 396 (9th Cir. 1996), the Ninth Circuit held that § 440(a)'s elimination of judicial review was constitutional notwithstanding due process and separation of powers principles. The Ninth Circuit explained that "[s]ince the Constitution empowers Congress to define lower federal court jurisdiction and formulate policies for the expulsion or exclusion of aliens, section 440(a) does not . . . 'offend the separation of powers.'" *Id.* at 400 (citation omitted). Likewise, the court concluded that "[s]ince aliens have no constitutional right to judicial review of deportation orders, section 440(a) does not offend due process." *Ibid.*

In sharp contrast to the Ninth Circuit's holding, the Third Circuit in *Salazar-Haro* v. *INS*, 95 F.3d 309 (1996), noted that judicial review of deportation decisions cannot categorically be denied. As the court explained, "'[i]t is well established that

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Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 IND. L.J. 233, 269 (1990).

the Fifth Amendment entitles aliens to due process of law in deportation'." *Id.* at 311 (quoting *Reno* v. *Flores*, 507 U.S. 292, 306 (1993)). The court thus held that "[t]o the extent, therefore, that constitutional rights applicable to aliens may be at stake, judicial review may not be withdrawn by statute." *Id.* at 311 (citing *Felker* v. *Turpin*, 116 S. Ct. 2333 (1996)).

In further contrast to the rulings of the Third and Ninth Circuits, the First and Second Circuits have simply avoided the difficult constitutional issues raised by § 440(a). For instance, in *Hincapie-Nieto* v. *INS*, 92 F.3d 27 (2d Cir. 1996), the court held that it did not have to decide the constitutionality of § 440(a) issues since the government there conceded that notwithstanding § 440(a), an alien could still "challenge his detention by application for habeas corpus in the event that he is taken into INS custody pursuant to 8 U.S.C. §§ 1105a(a)(8) and 1252(c)." *Id.* at 31. As the court explained, "[s]ince the Government acknowledges that at least some avenue for judicial relief remains available, we see no infirmity in the repeal of our prior jurisdiction. . ." *Ibid.* And in *Innis* v. *INS*, 1996 WL 550104 (1st Cir. 1996) (Table), the court took yet a different approach by simply "assum[ing], without deciding, that we have jurisdiction is hear this petition," and then proceeding to decide the appeal on the basis of hypothetical jurisdiction.

Confusion over the constitutionality of § 440(a) also has spilled into the district courts. For instance, in *Mbiya* v. *INS*, 930 F. Supp. 609, 612 (N.D. Ga. 1996), the court held that despite the preclusive language of § 440(a), habeas corpus jurisdiction under 28 U.S.C. § 2241 still would "extend to those situations in which the petitioner's deportation would result in a fundamental miscarriage of justice." As the court explained, "[a]ny attempt by Congress to restrict this sphere of authority necessarily would create constitutional difficulties not only with respect to the Suspension Clause, but also with respect to the Constitution's delineation of authority between the

branches of government." *Ibid.* The *Mbiya* court, however, refused to exercise its habeas jurisdiction because the alien was "not in the physical of the INS or in post-custody release from that status." Accord *Powell* v. *Jenifert*, 937 F. Supp. 1245, 1252-53 (E.D. Mich. 1996) ("this Court, like the court in *Mbiya*, concludes that habeas relief is available in this case only if Petitioner can identify a grave constitutional error or a fundamental miscarriage of justice in his deportation proceeding").

In short, recent attempts to apply § 440(a) only serve to confirm the federal courts' long-standing uncertainty over the constitutional limits on Congress' power to preclude judicial review of final orders of deportation—uncertainty that will only continue to deepen in the wake of Congress' recent and expanded efforts to preclude judicial review in deportation cases. Review by this Court is warranted to resolve this confusion among the federal courts and to bring needed clarity to this important area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Raad QASGUARGIS, Petitioner,
v.
IMMIGRATION AND
NATURALIZATION SERVICE,
Respondent.

No. 96-3505.

United States Court of Appeals,
Sixth Circuit.

June 17, 1996. [FN*]

FN* This order originally issued as an "unpublished order" filed on June 17, 1996. On July 16, 1996 the court designated the order as one recommended for full-text publication.

Alien petitioned for review of decision of Board of Immigration Appeals (BIA) finding him deportable. On alien's motion for discretionary stay of deportation, the Court of Appeals held that provision of Antiterrorism and Effective Death Penalty Act preventing judicial review of deportation orders for certain criminal offenses applied to petition for review filed after statute was enacted.

Dismissed.

[1] ALIENS → 54.3(1)
24K54.3(1)

Provision of Antiterrorism and Effective Death Penalty Act removing judicial review of deportation order for certain criminal offenses applied to preclude petition for review that was not pending when provision was enacted. Immigration and Nationality Act, § 106(a)(10), as amended, 8 U.S.C.A. § 1105a(a)(10).

[1] HABEAS CORPUS → 521
197K521

Provision of Antiterrorism and Effective Death Penalty Act removing judicial review of deportation order for certain criminal offenses applied to preclude petition for review that was not pending when provision was enacted. Immigration and Nationality Act, § 106(a)(10), as amended, 8 U.S.C.A. § 1105a(a)(10).

[2] ALIENS → 40
24k40

Application of new immigration law to prior criminal conduct is not retroactive application.

*789 Charles S. Owen, Gatto, Bennett & Owen, Southfield, MI, for Petitioner.

Edmund A. Sargus, Jr., U.S. Atty., Office of the U.S. Attorney, Cincinnati, OH, Richard M. Evans, David M. McConnell, M. Jocelyn Wright, U.S. Dept. of Justice, Immigration Litigation, Civil Division, Washington, DC, for, Respondent.

Before: KEITH, CONTIE, AND NELSON, Circuit Judges.

ORDER

The petitioner seeks review of a decision of the Board of Immigration Appeals which concludes he is deportable and dismisses his appeal from the decision of the immigration judge. Now before the court is the petitioner's motion for a discretionary stay of his deportation and the Immigration and Naturalization Service's cross motion to dismiss this appeal.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act, P.L. 104-132, was signed into law. Section 440(a) amends 8 U.S.C. § 1105a(a)(10) to provide in part:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C) or (D) shall not be subject to review by any court.

The petitioner was found deportable pursuant to §§ 241(a)(2)(B)(i) and (a)(2)(C), 8 U.S.C.§§ 1251(a)(2)(B)(i) and 1251(a)(2)(C), 8 U.S.C. §§ 1251(a)(2)(B)(i) and 1251(a)(2)(C), based upon a controlled substances offense and a firearms offense. Deportability was affirmed by the Board of Immigration Appeals, which rejected the petitioner's sole argument. On May 2, 1996, the instant petition for review was filed.

[1] No specific effective date was provided for § 440(a), and it accordingly took effect upon the date of enactment. Therefore, at the time that this petition for review was filed, the petitioner had no statutory right of review. The Immigration and Naturalization Service moves to dismiss this appeal on that basis. The petitioner argues dismissal would be an unlawful, retroactive application of the amendment because prior thereto, the statute permitted an appeal of a final order of deportation such as the instant one.

[2] The application of § 1105a(a)(10), as amended, to this petition for review is not improper. First of all, this petition for review was not pending at the time the amendment was enacted. The first attempt at judicial review was made after the statute had taken effect. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, -----, 114 S.Ct. 1483, 1501, 128 L.Ed.2d 229 (1994)("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was

filed.") Secondly, this court similarly has held that the application of new immigration law to prior *790 criminal conduct is not a retroactive application. *Hamama v. I.N.S.*, 78 F.3d 233, 235 (6th Cir. 1996); *Campos v. I.N.S.*, 16 F.3d 118, 122 (6th Cir.1994)(statutory bar did not present a true questions of retroactivity because a statute is not made retroactive merely because it draws upon antecedent facts for its operation). We therefore conclude that this appeal is barred by 8 U.S.C. § 1105a(a)(10), as amended by § 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996.

Therefore, it is ORDERED that the motion to dismiss is granted. The motion for a discretionary stay is denied as moot.

No. 96-3505

UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

RAAD QASGUARGIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
IMMIGRATION AND NATURALIZATION SERVICE,	)	
	)	
Respondent.	)	

BEFORE: KEITH, CONTIE and NELSON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A17 069 600 - Detroit

In re: RAAD QASGUARGIS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Renee B. Harp, Esquire
Gatto, Bennett & Owen
25899 W. Twelve Mile Road
Suite 120
Southfield, Michigan 48034

ON BEHALF OF SERVICE:
Michael B. Dobson
General Attorney

CHARGE:

Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] -
Convicted of controlled substance violation

Lodged: Sec. 241(a)(2)(C), I&N Act [8 U.S.C. § 1251(a)(2)(C)] -
Convicted of firearms violation

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM. In a decision dated January 20, 1995, an Immigration Judge found the respondent to be deportable on the charges set forth above and ordered his deportation to Iraq. The respondent has appealed, contending that the Immigration Judge of erred by finding him to be deportable under section 241(a)(2)(C) of the Immigration and Naturalization Act, 8 U.S.C. §§1251(a)(2)(C), and ineligible for a waiver of inadmissibility pursuant to section 212(c) of the Act, 8 U.S.C. § 1182(c). The respondent's sole argument in his brief on appeal is that the Immigration Judge erred by applying section 241(a)(2)(C) of the Act retroactively to his 1981 conviction for "attempted carrying a concealed weapon" in violation of Michigan law.

In Matter of Chow, 20 I&N Dec. 647 (BIA 1993), aff'd, 9 F.3d 1547 (5th Cir. 1993), this Board held that section 241(a)(2)(C) does apply to firearms offenses which occurred prior to the enactment of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, which revised and redesignated the deportation grounds. See also section 203 of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4311. Accordingly, the Immigration Judge concluded correctly that the respondent is deportable on the lodged charge and that he is consequently ineligible for a section 212(c) waiver of inadmissibility.

Based on the foregoing, the respondent's appeal is hereby dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE

Immigration Court for Chicago, Illinois

File: A17 - 069 - 600	)	Date: January 20, 1995
	)	
In the Matter of:	)	IN DEPORTATION
Raad Manual	)	PROCEEDINGS
QASGUARGIS,	)	PROCEEDINGS UNDER
	)	SECTION 242 OF THE
	)	IMMIGRATION AND
	)	NATIONALITY ACT

CHARGE: Section 241(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2)(B)(i)] -- Convicted of a controlled substance violation.

Section 241(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2)(C) -- Convicted of a firearms offense. (Lodged.)

APPLICATION:

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) -- Waiver of inadmissibility.

ON BEHALF OF THE RESPONDENT:

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DECISION OF THE IMMIGRATION JUDGE

The respondent, a native and citizen of Iraq, entered the United States at or near New York, New York, on or about February 17, 1966, at which time he was admitted as an immigrant. On November 30, 1981, the Recorder's Court, Detroit, Michigan, convicted the respondent for the offense of attempted carrying a concealed weapon, a violation of Mich. Comp. Laws § 750.227, and sentenced the respondent to one year probation. On April 23, 1987, the Oakland County Circuit Court, Pontiac, Michigan, convicted the respondent for delivery of a controlled substance, a violation of Mich. Comp. Laws §§ 333.7401(1) and (2)(a)(iv), and sentenced the respondent to three to twenty years incarceration.

On June 23, 1993, the Immigration and Naturalization Service ("Service") commenced deportation proceedings by filing an order to Show Cause ("OSC") with the Immigration Court. In the OSC, the Service charged the respondent as deportable under sections 241(a)(2)(B)(i) for having been convicted of a controlled substance violation. At proceedings held on November 9, 1993, the respondent, through his counsel, admitted the factual allegations and conceded the charge of deportability contained in the OSC. Based on the respondent's concession concerning the charge contained in the

OSC, the Court found that deportability on this first ground was established by clear, unequivocal, and convincing evidence. See Woodby v. INS, 385 U.S. 276, 280 (1966); 8 C.F.R. § 242.14(a) (1994).

Once deportability was established, the Court afforded the respondent the opportunity to designate a country for deportation and specify the forms of relief for which he would be applying. The respondent designated Iraq and indicated that he would seek relief under section 212(c) of the Act. A final merits hearing was held on October 24, 1994, at the close of which the Court indicated it would render a written decision.

On November 2, 1994, the Service filed a motion to reopen and reconsider this file an additional charge of deportability. The Court granted the motion on December 7, 1994. During a telephonic hearing on December 27, 1994, the Service set forth an additional allegation of fact and lodged that the respondent was also deportable under section 241(a)(2)(C) of the Act for having been convicted of a firearms offense. See Ex. 9. The respondent, through counsel, admitted the additional factual allegation, but neither admitted nor denied the lodged charge.

Based on the respondent's admission to the additional factual allegation, the representations of counsel and the trial attorney, and the conviction record, see Ex. 4, the Court found that clear, unequivocal, and convincing evidence supported the lodged charge of deportability. See Woodby v. INS, 385 U.S. at 280; 8 C.F.R. § 242.14(a).

The lodged charge is based on the respondent's conviction for attempted carrying of a concealed weapon under Michigan law. While Matter of Hou, Int. Dec. 3178 (BIA 1992), underscores that na attempted firearms violation cannot

support a charge of deportability under section 241(a)(2)(C) of the Act, the recently enacted Immigration and Nationality Correction Act of 1994 ("TCA") states otherwise.[1] Moreover, the TCA provided that the amendments made by section 203 of the TCA of 1994 "shall apply to convictions occurring before, on, or after the date of the enactment" of the TCA.

Because the respondent committed a firearms offense within the meaning of section 241(a)(2)(C) of the Act, he is statutorily ineligible for section 212(c) relief from the deportation.[2] See Matter of Hernandez-Casillas, Int. Dec. 3147 at 7 (BIA 1990; Att'y Gen. 1991), aff'd, 983 F.2d 231

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[1] Specifically, the Act, as amended, now reads

> Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

See Immig. & Nat'l. Tech. Correct. Act of 1994 § 203 (1994) (emphasis added).

[2] To qualify for relief under section 212(c), an alien must establish: 1) lawful admission as a permanent resident; 2) an unrelinquished domicile of seven consecutive years following the grant of permanent resident status; 3) that the ground of deportability is subject to a waiver; and 4) that a favorable exercise of discretion is warranted.

For purposes of this decision, the Court will not question whether the respondent has established the first two elements. That he has failed to establish the third, however, is certain. In Matter of Silva, 16 I&N Dec. 26, 28 (BIA 1976), the Board of Immigration Appeals ("BIA") held that section 212(c) permits a waiver of certain grounds of deportability in a deportation hearing only if analogous grounds of inadmissibility exist. Insofar as there is no analogous ground of excludability for a firearms offense, the respondent is statutorily ineligible for section 212(c) relief. See also Matter of Granados, 16 I&N Dec. 726, 728 (BIA 1979).

(5th Cir. 1993). Accordingly, his application for relief will be pretermitted, and the Court will enter the following order.

ORDER: IT IS ORDERED that the respondent be deported from the United States to Iraq on the charge contained in the Order to Show Cause and the lodged charge.

ANTHONY D. PETRONE
IMMIGRATION JUDGE

Article III Of The United States Constitution

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

Supreme Court, U.S.
FILED
JAN 22 1997
CLERK

No. 96-806

In the Supreme Court of the United States

OCTOBER TERM, 1996

RAAD QASGUARGIS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

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QUESTION PRESENTED

Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which divests the courts of jurisdiction to review deportation orders against aliens convicted of certain serious crimes, violates the Due Process Clause of the Fifth Amendment or the separation of powers doctrine.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-806

RAAD QASGUARGIS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 91 F.3d 788. The opinions of the Board of Immigration Appeals (Pet. App. 6a-7a) and the immigration judge (Pet. App. 8a-12a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1996. A petition for rehearing was denied on August 21, 1996. Pet. App. 5a. The petition for a writ of certiorari was filed on November 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Iraq, entered the United States as a lawful permanent resident on February 17, 1966. In 1981, he was convicted in Michigan state court of attempting to carry a concealed weapon and was sentenced to one year of probation. In 1987, he was convicted in Michigan state court for delivering a controlled substance, cocaine, and was sentenced to three to twenty years' imprisonment. Pet. App. 9a.

2. a. On June 23, 1993, the Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner, contending that petitioner's controlled substance conviction rendered him deportable under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(B)(i). Petitioner admitted the conviction and conceded deportability, but requested discretionary relief from deportation under Section 212(c) of the INA, 8 U.S.C. 1182(c). Pet. App. 9a-10a.

b. On November 2, 1994, the INS moved the immigration judge to reopen proceedings in order to lodge an additional charge of deportability against petitioner under Section 241(a)(2)(C) of the INA, 8 U.S.C. 1251(a)(2)(C), based on petitioner's 1981 firearms conviction. After the immigration judge granted the motion to reopen, petitioner admitted the factual allegations relating to his firearms conviction, but neither conceded nor disputed the additional charge of deportability. On the basis of petitioner's admission, counsels' representations, and an examination of the record of conviction, the immigration judge concluded that clear and unequivocal evidence supported the charge. Pet. App. 10a.

c. The immigration judge concluded that, because petitioner's firearms conviction was a ground of deportability for which there was no analogous ground of inadmissibility, petitioner was statutorily ineligible for discretionary relief under Section 212(c). Pet. App. 11a-12a (citing *In re Hernandez-Casillas*, 20 I. & N. Dec. 262, 280 (Att'y Gen. 1991), aff'd, 983 F.2d 231 (5th Cir. 1993) (Table)). The immigration judge therefore ordered his deportation to Iraq. *Id.* at 12a.

d. On April 9, 1996, the Board of Immigration Appeals (BIA) affirmed the order of deportation. Pet. App. 6a-7a. It rejected petitioner's argument that he was not deportable under Section 241(a)(2)(C) based on his 1981 conviction for "attempted carrying of a concealed weapon." Although the BIA recognized that conviction of an attempt-based firearms offense did not constitute a ground for deportability under Section 241(a)(2)(C) until the enactment of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 203, 108 Stat. 4311, it concluded that the immigration judge had correctly applied the law as it existed at the time of the deportation hearing, and that the immigration judge had correctly determined under that law that petitioner was statutorily ineligible for Section 212(c) relief. Pet. App. 7a.

3. At the time of the BIA's decision, Section 106(a)(1)-(6) of the INA, 8 U.S.C. 1105a(a)(1)-(6), authorized review of final orders of deportation in the courts of appeals, and Section 106(a)(10) of the INA, 8 U.S.C. 1105a(a)(10), authorized the district courts to entertain petitions for writs of habeas corpus filed by aliens held in custody pursuant to orders of deportation.

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 401(e) of the AEDPA repealed INA § 106(a)(10)'s special provision for habeas jurisdiction, 110 Stat. 1268, and Section 440(a) of the AEDPA amended Section 106(a)(10) to exclude from judicial review final orders of deportation entered against certain classes of criminal aliens, 110 Stat. 1276. As amended by the AEDPA, Section 106(a)(10) read in pertinent part as follows:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) * * * shall not be subject to review by any court.

110 Stat. 1276-1277.[1] Section 440(d) of the AEDPA, in turn, amended INA § 212(c) to eliminate the Attorney

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[1] On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (*reproduced at* 142 Cong. Rec. H11,787-H11,833 (daily ed. Sept. 28, 1996)), which effected a sweeping overhaul of the INA. Section 306(b) of IIRAIRA repeals Section 106 of the INA, which heretofore has governed the review of deportation and exclusion orders (and which Section 440(a) of the AEDPA had amended), and Section 306(a) of IIRAIRA replaces it with a new Section 242, which precludes judicial review of deportation orders against aliens, like petitioner, who are deportable by reason of having committed drug-trafficking or firearms offenses. IIRAIRA § 306(a)(2) (*reproduced at* 142 Cong. Rec. H11,803-H11,804 (daily ed. Sept. 28, 1996)). Because petitioner's deportation order was entered in 1996, however, IIRAIRA's judicial review provisions do not apply to his case. See IIRAIRA § 309(a) and (c)(4) (*reproduced at* 142 Cong. Rec. H11,808 (daily ed. Sept. 28, 1996)), as amended by

General's authority to grant relief from deportation to any "alien who is deportable by reason of having committed any [such] criminal offense." 110 Stat. 1277. Petitioner, as noted, is deportable by reason of having committed criminal offenses covered in Section 241(a)(2)(B)(i) and (C) of the INA, 8 U.S.C. 1251(a)(2)(B)(i) and (C). See Pet. App. 3a.

4. On May 2, 1996, petitioner filed a petition for review of his final order of deportation in the United States Court of Appeals for the Sixth Circuit. Pet. App. 3a. On June 17, 1996, the court of appeals granted the government's motion to dismiss. *Id.* at 1a-4a (per curiam). The court concluded that Section 440(a) of the AEDPA barred the petition for review. *Id.* at 3a-4a (citing *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.")).[2]

Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 (changes effected by Title III-A of IIRAIRA generally become effective on April 1, 1997); see *INS* v. *Yang*, 117 S. Ct. 350, 352 n.1 (1996).

[2] The court rejected without discussion petitioner's argument that the Due Process Clause of the Fifth Amendment and the principle of separation of powers required judicial review of the BIA's determination that petitioner was statutorily ineligible for Section 212(c) relief.

ARGUMENT

Petitioner no longer contests the court of appeals' holding that Section 440(a) of the AEDPA applies to cases, like this one, in which the convictions that form the bases for the order of deportation occurred before the AEDPA's enactment.[3] Rather, petitioner argues that the Court should grant certiorari in this case to resolve "once and for all" what he describes as the "difficult question of whether deporting lawful permanent [resident aliens] without independent judicial scrutiny violates the Due Process Clause of the Fifth Amendment and/or the separation of powers doctrine of Article III, § 1"—a question over which, petitioner contends, "the federal courts have divided." Pet. 5-6.

The court of appeals correctly rejected petitioner's argument that due process or the doctrine of separation of powers requires judicial review of his statu-

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[3] With the exception of the Seventh Circuit, which deviated in a limited respect, the other courts of appeals that have considered the issue have also concluded that Section 440(a) operated immediately upon its enactment to divest the courts of jurisdiction to review final orders of deportation. See *Kolster* v. *INS*, 101 F.3d 785, 787-791 (1st Cir. 1996); *Salazar-Haro* v. *INS*, 95 F.3d 309, 310-311 (3d Cir. 1996); *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 29 (2d Cir. 1996); *Duldulao* v. *INS*, 90 F.3d 396, 398-400 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 674-676 (5th Cir. 1996), cert. denied, No. 96-6076 (Jan. 6, 1997); see also *Sanchez-Rodriguez* v. *INS*, No. 96-9518 (10th Cir. July 12, 1996) (per curiam order dismissing petition for review for lack of jurisdiction); *Rolle* v. *INS*, No. 96-4560 (11th Cir. July 15, 1996) (same); but see *Reyes-Hernandez* v. *INS*, 89 F.3d 490, 492-493 (7th Cir. 1996) (Section 440(a) does not apply to an alien who had a nonfrivolous defense to a charge of deportability but conceded deportability and sought Section 212(c) relief before the enactment of the AEDPA).

tory claim, and (contrary to petitioner's suggestion) its decision does not conflict with any decision of this Court or of any other court of appeals. The court below had no occasion to address the broader issue whether Congress may bar all avenues of judicial review of all issues (including constitutional issues) that may arise in a deportation proceeding. Nor has that issue been decided by any other court of appeals.

1. Contrary to petitioner's argument (Pet. 5-6), there is no conflict among the courts of appeals "over the constitutional limits on Congress' power to preclude judicial review in deportation cases." Section 440(a) of the AEDPA eliminated the statutory provisions for review of final orders of deportation entered against permanent resident aliens who are deportable because they have been convicted of certain serious criminal offenses. See *Kolster* v. *INS*, 101 F.3d 785, 787-791 (1st Cir. 1996); *Salazar-Haro* v. *INS*, 95 F.3d 309, 310-311 (3d Cir. 1996); *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 29 (2d Cir. 1996); *Duldulao* v. *INS*, 90 F.3d 396, 398-400 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 674-676 (5th Cir. 1996), cert. denied, No. 96-6076 (Jan. 6, 1997); see also *Sanchez-Rodriguez* v. *INS*, No. 96-9518 (10th Cir. July 12, 1996) (per curiam order dismissing petition for review for lack of jurisdiction); *Rolle* v. *INS*, No. 96-4560 (11th Cir. July 15, 1996) (same). No court of appeals has accepted petitioner's argument that the Due Process Clause of the Fifth Amendment and the separation of powers doctrine require that every aspect of a final order of deportation be subject to direct judicial review. The only court of appeals that has addressed that argument rejected it. See *Duldulao*, 90 F.3d at

399-400.[4] Moreover, the argument that the Constitution requires the availability of judicial review is especially weak where, as here, the alien has conceded that he is deportable and the only remaining dispute concerns whether he is eligible to be considered for discretionary relief from deportation.

At the same time, neither the Ninth Circuit in *Duldulao* nor any other court of appeals has held that Section 440(a) bars all avenues for judicial review of all issues that may arise in a deportation proceeding. To the contrary, several courts have indicated that Article I, § 9, of the Constitution may in certain limited instances require the availability of habeas corpus. See *Kolster*, 101 F.3d at 790 (Section 440(a)'s elimination of direct judicial review does not offend due process or separation of powers because "any habeas review that is required by the Constitution remains available"); *Salazar-Haro*, 95 F.3d at 311 (due process concerns are satisfied by the availability of constitutionally mandated habeas review); *Hincapie-Nieto*, 92 F.3d at 30-31 (noting that petitioner may seek relief in habeas, but "express[ing] no opinion on the nature of the remedy or the scope of [habeas] review that remains available in any court"); *Duldulao*, 90 F.3d at 400 n.4 ("The availability and scope of collateral habeas review where the 'paramount law of the Constitution' may require judicial intervention was not an issue before us, and we need not decide whether section 440(a) purports to preclude it.") (citation omitted).

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[4] For the reasons set forth at pages 8-14 of our Supplemental Brief in *INS* v. *Elramly*, 117 S. Ct. 31 (1996) (No. 95-939) (a copy of which has been provided to petitioner), we believe that *Duldulao* was correctly decided.

Because the lower courts have not yet ruled on what claims (if any) relating to final orders of deportation must be subject to review on petition for a writ of habeas corpus, that issue does not warrant this Court's review at this time. Even if the availability and breadth of constitutionally required habeas were ripe for review, moreover, this case would be an inappropriate vehicle for decision, because petitioner has not sought a writ of habeas corpus.[5] Cf. *Kolster*,

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[5] We have little doubt that, had petitioner filed a petition for a writ of habeas corpus, it would have been denied, and rightly so. The constitutional writ has historically been available in the deportation context only to redress significant violations of constitutional rights or ultra vires actions exceeding the Attorney General's delegated power or jurisdiction. It does not extend to claims of lesser errors, such as a lack of substantial evidence to support a decision, an abuse of discretion, or (as here) a claim that the Attorney General or her delegate has misinterpreted a non-jurisdictional statutory provision. See, *e.g.*, *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus. But a want of due process is not established by showing merely that the decision is erroneous.") (citations omitted); *United States ex rel. Tisi* v. *Tod*, 264 U.S. 131, 132-134 (1924) ("Tisi's claim to be discharged on habeas corpus rests wholly upon the contention that he has been denied due process of law. * * * [M]ere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law.").

Petitioner does not suggest that the BIA transgressed the Constitution, or that its decision in this case exceeded the Attorney General's delegated power or discretion. Rather, his underlying claim is that the BIA erred when it determined that petitioner was statutorily ineligible for Section 212(c) relief. To the extent that Article I, § 9, of the Constitution vests in the courts an irreducible habeas jurisdiction, that

101 F.3d at 791 ("As the nature and scope of habeas review available to aliens like Kolster is not properly before us at this time, we do not reach those questions."); accord *Duldulao*, 90 F.3d at 400 n.4.

2. In any event, further review in this case is unwarranted because the Attorney General no longer has the authority to provide petitioner the relief from deportation that he requests. Before the enactment of the AEDPA, the final sentence of Section 212(c) stated that discretionary waivers were not available to any "alien who ha[d] been convicted of one or more aggravated felonies and ha[d] served for such felony or felonies a term of imprisonment of at least 5 years." Section 440(d) of the AEDPA amended that sentence to provide that Section 212(c) "shall not apply," *inter alia*, to any "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D)." 110 Stat. 1277. As noted above, petitioner is deportable by reason of having committed criminal offenses covered in Section 241(a)(2)(B)(i) and (C).

The AEDPA does not specify in terms whether Section 440(d) bars the Attorney General from acting on a petition for relief filed by an alien on or before the date of its enactment. Because the actual granting of relief is the action targeted by the amendment of Section 212(c), however, it follows that the amendment eliminated the Attorney General's power to provide relief in pending cases.[6]

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jurisdiction does not extend to run-of-the-mine differences over statutory interpretation.

[6] The BIA held in *In re Soriano*, Interim Dec. No. 3289 (June 27, 1996), that the BIA has authority to provide relief in pending cases. At the request of the INS, the BIA referred its

In *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), this Court emphasized the prospective nature of proceedings respecting deportation:

> A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime. The deportation hearing looks prospectively to the [alien's] right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the [alien's] right to remain.

Id. at 1038 (citations omitted). As Congress's views respecting "persons whom it does not want" (*Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913)) change over time, deportation laws are modified accordingly. See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) ("any policy toward aliens is vitally and intricately interwoven with contemporaneous policies") (emphasis added). The focus of the enterprise is forward-looking—*i.e.*, whether an alien should be permitted "to remain in this country in the future." *Lopez-Mendoza*, 468 U.S. at 1038. As a general matter, therefore, statutes that modify the standards for deportation should presumptively be given present effect.[7]

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decision in *Soriano* to the Attorney General for her review. See 8 C.F.R. 3.1(h). By order dated September 12, 1996, the Attorney General vacated the BIA's opinion in *Soriano*, pending her further determination.

[7] For that reason, petitioner's underlying claim—that only attempt-based firearms convictions entered after the enactment of the Immigration and Nationality Technical Correc-

The AEDPA's constriction of the universe of criminal aliens who are eligible for Section 212(c) relief similarly warrants present application. In exercising the Attorney General's discretion under Section 212(c), the BIA looks prospectively to "whether the granting of section 212(c) relief appears in the best interests of this country." *In re Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978). Accordingly, "[l]ike statutes altering the standards for injunctive relief," changes in the scope of the Attorney General's discretionary authority "ha[ve] only a prospective impact." *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996).

Congress's modification of Section 212(c) is, moreover, analogous to the adoption of a new jurisdictional rule. Just as new "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 511 U.S. at 274, Section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to obtain such relief. The principles underlying the present application of jurisdictional rules to pending cases thus apply equally in this context. See *Scheidemann*, 83 F.3d at 1523 ("Like statutes constricting the jurisdiction of a judicial body," changes to the class of aliens eligible for Section 212(c) relief "speak only to the power of a public agency.").

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tions Act of 1994 are grounds for deportation under Section 241(a)(2)(C) of the INA—is without merit.

Because the Attorney General lacks authority under current law to grant respondent's application for a waiver of deportation under Section 212(c),[8] this case is moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1997

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[8] We note that Section 304 of IIRAIRA repeals Section 212(c) in its entirety and replaces it with a new Section 240A, which authorizes a form of discretionary relief termed "cancellation of removal." See IIRAIRA § 304(a)(3) and (b) (*reproduced at* 142 Cong. Rec. H11,800 (daily ed. Sept. 28, 1996)). However, with certain limited exceptions not applicable here, IIRAIRA's provisions respecting cancellation of removal apply only to administrative proceedings initiated after April 1, 1997. See IIRAIRA § 309(a) and (c) (*reproduced at* 142 Cong. Rec. H11,808 (daily ed. Sept. 28, 1996)).

Supreme Court, U.S.
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No. 96-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RAAD QASGUARGIS, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

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RAAD QASGUARGIS,

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

The petition explains that confusion pervades the federal courts over whether, to what extent, and where, final orders of deportation are judicially reviewable, notwithstanding § 440(a). The petition also demonstrates that the fundamental question of whether the Constitution guarantees judicial review of deportation orders is one of great importance and historical significance, and one that will impact thousands of pending and future deportation cases. Respondent does not take issue with these propositions. Nor does it offer *any* response to the constitutional authorities, cited and discussed by petitioner, which confirm that a lawful resident alien cannot constitutionally be deprived of their liberty without any opportunity to challenge the lawfulness of that deprivation in an impartial forum.

In fact, respondent's Brief itself acknowledges that judicial review of deportation orders is constitutionally guaranteed. However, it contends (without citation of Supreme Court authority) that the Constitution only guarantees such review of substantial constitutional claims under Article I, § 9. Respondent also argues that the Constitution guarantees no judicial review of final deportation orders even if they violate the laws of the United States or are the product of an abuse of discretion. Such arguments, at best, only go to the merits of the questions presented, and provide no basis for denying certiorari. More importantly, for the reasons explained at Pet. 7-18, the limited review proposed by respondent falls far short of that which is guaranteed by the Due Process Clause and Article III, given both the magnitude of the liberty interests at stake and the unacceptable probability of error the absence of judicial review.

In short, the Brief in Opposition offers nothing to diminish the significance of the fundamental constitutional questions presented in the Petition, or to minimize the compelling need for immediate review of those questions given the differing conclusions reached by the courts of appeals, and the drastic and irreparable consequences for lawful permanent residents like petitioner who now face imminent deportation.

1. In the petition, we demonstrated that the courts of appeals and district courts have reached differing conclusions concerning the extent to which judicial review of final orders of deportation is constitutionally guaranteed, and also the forum where such judicial review is to take place. Pet. 21-24. The Third Circuit, for instance, has held that judicial review cannot be precluded where "constitutional rights applicable to aliens may be at stake." *Salazar-Haro* v. *INS*, 95 F.3d 309, 311 (3d Cir. 1996). In *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996), the First Circuit also recognized the "serious question" of § 440(a)'s constitutionality, and flatly rejected the government's

claim that the constitutionality of § 440(a) could simply be determined by reference to Congress' power over immigration:

> The question of section 440(a)'s constitutionality is not wholly resolved by reference to Congress' plenary power over matters concerning immigration. While it is true that "over no conceivable subject is the legislative power of Congress more complete," *Reno* v. *Flores*, [507 U.S. 292, 305 (1993)], the Supreme Court has also said that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present alien is entitled to a fair hearing when threatened with deportation, and * * * we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation." *Landon* v. *Plasencia*, [459 U.S. 21, 32-33 (1982)]. Given this recognition that continuously present aliens, like Kolster, do have some constitutional status, our analysis of whether judicial review is constitutionally required here cannot turn on the fact that section 440(a) only affects the rights of such aliens.

101 F.3d at 790 (citing *Salazar-Haro*, 85 F.3d at 311). In contrast, the Ninth Circuit has held that judicial review can constitutionally be abolished notwithstanding the Due Process Clause and Article III of the Constitution given Congress' power over immigration and the jurisdiction of the lower federal courts. *Duldulao* v. *INS*, 90 F.3d 396 (9th Cir. 1996). Respondent's brief offers nothing to dispel this apparent confusion. Nor does respondent deny the enormous volume of ongoing litigation that now confronts the courts of appeals over the constitutional limit on Congress' power to preclude judicial

review of final orders of deportation, particularly against lawful permanent residents like petitioner.[1]

As Justice Scalia has noted, there is "[n]othing more wasteful than litigation about where to litigate." *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (dissenting opinion). Indeed, to avoid such litigation, this Court in *Felker* v. *Turpin*, 116 S. Ct. 2333 (1996), granted expedited review to determine the constitutionality of other jurisdictional provisions of the AEDPA dealing with habeas corpus review. In this case, the need for immediate review is every bit as compelling as it was in *Felker*. Specifically, there is an urgent need for this Court to decide whether, and to what extent, the Constitution guarantees resident aliens like petitioner the opportunity to challenge their final orders of deportation. The confusion over whether, and where, judicial review of deportation orders may be sought has had enormous practical consequences both for aliens facing imminent deportation, for their counsel, and for the courts—none of which have any clear understanding of where aliens may now go to challenge the lawfulness of a deportation order, or under what circumstances such review must constitutionally be made available.

Respondent's Brief does not address these consequences, let alone the magnitude of what is at stake for lawful resident aliens like petitioner who now face imminent deportation to places like Iraq, and permanent separation from their families, all without any prospect of impartial judicial review. The need for review of the questions presented also is especially immediate given that petitioner, and others like him who are similarly

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[1] As explained in the petition, § 440(a) also has caused confusion within the district courts regarding whether, and when, final orders of deportation are reviewable in habeas corpus. See, *e.g.*, *Mbiya* v. *INS*, 930 F. Supp. 609, 612 (N.D. Ga. 1996); *Powell* v. *Jenifert*, 937 F. Supp. 1245 (E.D. Mich. 1996); *Eltayeb* v. *Ingham*, 1997 WL 5906 (S.D.N.Y. Jan. 7, 1997).

situated, will forever lose the opportunity to seek judicial review after they have been deported. See *Stone* v. *INS*, 115 S. Ct. 1537, 1546 (1995). For them, immediate Supreme Court review represents their only chance for a meaningful resolution of the important constitutional questions presented.

In short, respondent's Brief all but ignores the compelling circumstances that demonstrate the need for this Court to determine whether § 440(a) is constitutional, and whether Congress constitutionally can deprive lawful resident aliens like petitioner of their liberty without judicial review.

2. Notably, respondent's Brief appears to concede that judicial review of final orders of deportation cannot constitutionally be eliminated. Respondent assumes, however, without citation to any Supreme Court precedent, that the Constitution only guarantees judicial review through habeas corpus under Article I, § 9, and only then "to redress significant violations of constitutional rights or ultra vires actions" of the Attorney General. Br. In Opp. 9 n.5. If anything, respondent's claim that judicial review should be limited to constitutional claims in habeas corpus proceedings only begs the questions presented, and at best is addressed to the merits, rather than to the need for Supreme Court review. In any event, while petitioner wholeheartedly agrees that habeas corpus review of deportation orders is constitutionally guaranteed by Article I, § 9, such review, by itself, is not constitutionally sufficient under the Due Process Clause or Article III.

If, as respondent argues, habeas corpus review is restricted to substantial constitutional claims, such review will be all but meaningless since the overwhelming majority of deportation cases (like this case) involve only statutory claims. According to respondent, if a final order of deportation is issued in violation of the Immigration and Nationality Act, or if the BIA's denial of statutory relief from deportation constitutes an

abuse of discretion, an alien would no judicial recourse—by habeas corpus or otherwise—to prevent their deportation even if such deportation were to violate the laws of the United States.

As explained in the petition, the Due Process Clause, as applied by this Court to resident aliens in *Landon* v. *Plasencia*, 459 U.S. 21 (1982), guarantees judicial review because of the magnitude of the liberty interests at stake in deportation proceedings, and because of the unacceptably high risk of error in the absence of judicial review (a risk that respondent makes no attempt to deny). Pet. 7-11. Likewise, the Article III doctrine of separation of powers assures judicial review as a structural safeguard against "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power" (*INS* v. *Chadha*, 462 U.S. 919, 951 (1983)), and to ensure that the legal limits of governmental power are not judged by the very officials who seek to wield that power. *Gutierrez de Martinez* v. *Lamagno*, 115 S. Ct. 2227, 2233 (1995).

For all of these reasons, judicial review cannot constitutionally be limited only to substantial constitutional claims. Nor can final orders of deportation constitutionally be immunized from judicial scrutiny on the grounds they violate the laws of the United States, or are the product of an abuse of discretion. Without such forms of judicial review the risk of erroneous deportations and deprivations of constitutionally protected liberty interests will be unacceptably high. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (holding that "[a]gainst the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court"). As Judge Kozinski recently noted in explaining the need for judicial review of INS decisions, "agencies are run by people and people make mistakes. Review by a tribunal

outside the agency helps correct these rare but tragic errors. In the case of [aliens facing deportation], this may mean the difference between life and death; the effort is surely worth the candle." *Rodriguez-Roman* v. *INS*, 98 F.3d 416, 432 (9th Cir. 1996) (concurring opinion).

Respondent argues, however, that the need for "judicial review is especially weak where, as here, the alien has conceded that he is deportable and the only remaining dispute concerns whether he is eligible to be considered for discretionary relief from deportation." Br. in Opp. 8. To the contrary, the need for judicial review is *most* compelling when the question of eligibility for discretionary relief is at stake. Indeed, under § 440(a), aliens who seek statutory forms of relief such as asylum, withholding of deportation, suspension of deportation, and waivers of deportability, may be denied such relief for any reason, or no reason, without any measure of judicial scrutiny.[2]

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[2] Persons deportable for relatively minor offenses that do not rise to the level of an aggravated felony under § 101(a)(43) of the INA, are still be eligible for a variety of forms of statutory relief from deportation, including asylum, withholding of deportation, suspension of deportation and voluntary departure. The denial of such relief to such individuals, however, would no longer be subject to judicial review under § 440(a). For example, individuals convicted of petty drug offenses such as simple possession of a controlled substance are still eligible to seek political asylum, but because they would be deportable under 8 U.S.C. § 1251(a)(2)(B) would lose the ability to seek judicial review under § 440(a). Likewise, aliens deportable for committing two crimes of moral turpitude such as shoplifting or even bouncing a check (see *Matter of Khalik*, 17 I. & N. Dec. 518 (BIA 1980), would be eligible to seek asylum, withholding of deportation and other forms of relief, but would not be able to seek judicial review even if such relief is arbitrarily or unlawfully denied. It is no small irony that permanent residents who commit such relatively minor offenses actually would be the most likely to qualify for relief from deportation, and thus would have the greatest need for judicial review to guard against improper denials of such relief. Under § 440(a), however, it is precisely those aliens who would lose the ability to

These statutory forms of relief, however, were meant by Congress to serve as a means of protection against the threat or likelihood of persecution, or the guard against cases where deportation will result in extreme hardship to aliens and their families. While respondent may blithely discount the need for judicial review when such forms of relief are denied, it would be impossible to overstate "the importance of independent judicial review in an area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death." *Rodriguez-Roman* v. *INS*, 98 F.3d at 432 (Kozinski, J., concurring).

Habeas corpus also would not provide a constitutionally sufficient means of guaranteeing judicial review since the INA provides no means of assuring that aliens who are taken into INS custody will have any opportunity at all to even seek habeas corpus review. In fact, § 440(c) of the AEDPA provides that as soon as the Attorney General takes a deportable alien into custody, she "shall deport the alien as expeditiously as possible." 110 Stat. 1277. Accordingly, the only aliens who will be able to seek habeas corpus review will be those who are able to get to the courthouse before they are deported—a disturbing fact given that most aliens are not even represented by counsel and will have no way of knowing where or how to seek habeas corpus review. In short, restricting judicial review only to those few lucky aliens who are able to get to the courthouse before they are quickly deported will result in a constitutional system of justice that is nothing more than what Chief Judge Posner has described as a game of "Gotcha!" *Czerkies* v. *U.S. Dep't of Labor*, 73 F.3d 1435, 1438 (7th Cir. 1996) (en banc). Such a limited and arbitrary system of review cannot serve as the exclusive means of judicial

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seek judicial review of such orders.

review guaranteed by the Due Process Clause of the Fifth Amendment and Article III.

Petitioner is not asking this Court to delineate the extent to which final orders of deportation are reviewable in habeas corpus. This is not a habeas case. The question before the Court, rather, is whether the Constitution guarantees lawful resident aliens the ability to seek judicial review of final orders of deportation on the grounds that such orders violate the laws of the United States and/or constitute an abuse of discretion. Section 440(a), on its face, takes away all avenues of judicial review over final orders of deportation, including habeas corpus. The important and unanswered question presented for this Court's review is whether Congress constitutionally can accomplish what it plainly has intended to do through § 440(a).

Respondent's claim that the Constitution should be read only to guarantee limited review of deportation orders through habeas corpus simply begs the question of § 440(a) constitutionality, and wrongly presumes that it is the responsibility of the courts to fashion a constitutionally sufficient framework of judicial review over final orders of deportation. To be sure, that is not this Court's obligation. If this Court holds that § 440(a) is unconstitutional, and that lawful resident aliens cannot constitutionally be deported and deprived of their liberty without judicial review, it will be up to Congress to decide how that constitutional guarantee is to be discharged.[3]

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[3] There is no indication either from the text or the legislative history of the AEDPA that Congress intended to shift the forum of judicial review from the courts of appeals under former § 106(a) of the INA down to the district courts, and thus to return to the system of review in place prior to the enactment of § 106 in 1961. See *Foti* v. *INS*, 375 U.S. 217 (1963). In fact, § 440(a) deleted § 106(a)(10) of the INA, which formerly provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."

3. Respondent attempts to evade review in this case by suggesting that "the Attorney General no longer has the authority to provide petitioner the relief from deportation that he requests." Br. in Opp. 10. In fact, respondent's own Brief confirms that this question is entirely premature and one that has no connection at all to the questions presented. As respondent's Brief explains, the BIA in *Matter of Soriano*, Interim Dec. 3289 (1996), held that notwithstanding § 440(d) of the AEDPA, the Attorney General has the authority to grant § 212(c) relief to aliens like petitioner who applied for such relief prior to the statute's passage. Accord *Reyes-Hernandez* v. *INS*, 89 F.3d 480 (7th Cir. 1996) (Posner, C.J.) (holding that § 440(d) did not apply retroactively to alien who applied for § 212(c) prior to § 440(a)'s passage).[4] The Attorney General has vacated *Soriano* pending her review of that

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[4] As *Soriano* and *Reyes-Hernandez* each demonstrate, respondent's argument concerning the applicability of § 440(d) is simply wrong. Under *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), given the absence of any expressed congressional intent to apply § 440(d) to pending cases or to past conduct, the statute cannot be applied to render aliens like petitioner who previously applied for relief from deportation retroactively ineligible for such relief based upon convictions that were entered long before § 440(d) was enacted since to do so would attach "new legal consequences to events completed before its enactment." *Id.* at 270. The fact that, as respondent argues, deportation has prospective consequences is irrelevant since the alien's eligibility for relief from deportation is "quintessentially backward-looking." *Landgraf*, 511 U.S. at 282. The inquiry under § 212(c) turns entirely upon the alien's past conduct (*Reyes-Hernandez*, 89 F.3d at 493)—as does the applicability of § 440(d) itself. In *Landgraf*, this Court held that the compensatory damage remedies of the 1991 Civil Rights Act could not be applied retroactively since the availability of such relief turned solely on past conduct, and "would attach an important new legal burden to that conduct." 511 U.S. at 283. In this case, § 440(d) likewise would attach an important new legal consequence to convictions entered prior to § 440(d)'s passage by rendering the alien ineligible for relief from deportation based on the hardship that deportation would impose on both the alien and his/her family.

decision. Should the BIA's decision in *Soriano* be affirmed, the issue raised by respondent will never arise.

In any event, the question of whether the Attorney General has the power to grant petitioner the relief that he seeks is one that only will need to be addressed on remand to the BIA should this Court decide that the Sixth Circuit in fact possessed jurisdiction to consider his appeal. The ultimate resolution of that question also may well turn upon this Court's decision in *Lindh* v. *Murphy*, 117 S. Ct. 726 (Jan. 10, 1997) (No. 96-6298), in which this Court granted certiorari to determine whether other remedial provisions of the AEDPA dealing with habeas corpus review should be applied to prior pending cases. At this stage, it suffices to say that the difficult question of whether § 440(d) of the AEDPA applies retroactively to petitioner is one that has no connection to the questions presented, and in no way diminishes the propriety or need for Supreme Court review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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